

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 17-15470

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

CORRINE BROWN
Defendant-Appellant.

A DIRECT APPEAL OF A CRIMINAL CASE
FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA

SUPPLEMENTAL BRIEF OF APPELLANT

KENT & McFARLAND
ATTORNEYS AT LAW

WILLIAM MALLORY KENT
Fla. Bar No. 0260738
24 North Market Street, Suite 300
Jacksonville, Florida 32202
904-398-8000
904-348-3124 Fax
kent@williamkent.com

Counsel for Appellant Brown

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rule 26.1-1, I hereby certify that the following named persons are parties interested in the outcome of this case:

Birk, Edward L. – Counsel for Graham Media Group, Florida, Inc.

Brown, Corrine – Defendant/Appellant

Brown, Shantrel – Movant

CA Florida Holdings, Inc. - Movant

Conner, Timothy J. – Counsel for CA Florida Holdings, Inc. & Multimedia Holdings Corporation

Coolican, Michael – Assistant United States Attorney

Cox Media Group Jacksonville – Movant

Corrigan, Hon, Timothy J. – United States District Judge

DeMaggio, Bryan E. – Counsel for Brown, terminated

Duva, Andrew Tysen – Assistant United States Attorney

Fugate, Rachel E. – Counsel for Cox Media Group Jacksonville

Glober, Bonnie Ames – Assistant United States Attorney

Graham Media Group, Florida Inc. – Movant

Handberg, Roger Bernard, III – Assistant United States Attorney

Hass, David L. – Counsel for Brown, terminated

Kachergus, Matthew R. – Counsel for Brown, terminated

Kent, William Mallory – Appellate Counsel for Brown

Klindt, Hon. James R. – United States Magistrate Judge

Mansfield, Jennifer A. – Counsel for Multimedia Holdings Corporation &
CA Florida Holdings, Inc.

Multimedia Holdings Corporation - Movant

NeJame, Mark E. – Counsel for Defendant Brown, terminated

Olshan, Eric – Counsel for DOJ, Public Integrity Section

Rhodes, David Paul – Chief, Appellate Division, Office of the U.S. Attorney

Robinson, Sue-Ann N. – Counsel for movant, Shantrel Brown

Simmons, Elias – Co-defendant

Simpson, Allison Kirkwood – Counsel for Cox Media Group Jacksonville

Sheppard, William J. – Counsel for Brown, terminated

Smith, Daniel Austin – Counsel for Co-defendant, terminated

Smith, James Wesley, III – Counsel for Defendant Brown

Suarez, Anthony – Counsel for co-defendant

Walker, Samuel A. – Counsel for Brown

White, Elizabeth Louise – Counsel for Brown, terminated

Wilkison, Jesse B. – Counsel for Brown, terminated

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	C1
TABLE OF CONTENTS.....	i
TABLE OF CITATIONS	ii
STATEMENT OF JURISDICTION.....	iv
STATEMENT OF THE ISSUE.....	1
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT	3
STANDARD OF REVIEW	4
ARGUMENT	5
WHETHER THE COURT ERRED IN ORDERING CONGRESSWOMAN BROWN TO FORFEIT JOINTLY AND SEVERALLY WITH ELIAS SIMMONS AND CARLA WILEY UNDER 21 U.S.C. § 853?	
CONCLUSION.....	9
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS.....	10
CERTIFICATE OF SERVICE	10

TABLE OF CITATIONS

CASES

Connor v. Finch, 431 U.S. 407, 421, n. 19, 52 L. Ed. 2d 465, 97 S. Ct. 1828 (1977)
.....9

Honeycutt v. United States, 137 S. Ct. 1626 (2017)..... 3, 6, 7

Johnson v. United States, 318 U.S. 189, 200, 87 L. Ed. 704, 63 S. Ct. 549 (1943)..8

Johnson v. Zerbst, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938).....6

Molina-Martinez, 578 U.S., at ___, 136 S. Ct. 1338, 194 L. Ed. 2d 444, at 452
(2016).....4

Rosales-Mireles v. United States, 2018 U.S. Lexis 3690 (U.S. Supreme Court June
18, 2018)..... 3, 5, 9

Silber v. United States, 370 U.S. 717, 718, 8 L. Ed. 2d 798, 82 S. Ct. 1287 (1962) 8

United States v. Atkinson, 297 U.S. 157, 80 L. Ed. 555, 56 S. Ct. 391 (1936)8

United States v. Carlyle, 712 F. App'x 862 (11th Cir. 2017)10

United States v. Chittenden, 2018 U.S. App. LEXIS 20681 (4th Cir. July 25, 2018)
.....9

United States v. Dominguez Benitez, 542 U.S. 74, 76, 82, 124 S. Ct. 2333, 159 L.
Ed. 2d 157 (2004)4

United States v. Elbeblawy, 2018 U.S. App. LEXIS 21887 (11th Cir., August 7,
2018).....10

United States v. Olano, 507 U.S. 725, 732 (1993) 4, 6, 7, 9

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 239, 84 L. Ed. 1129, 60 S. Ct. 811 (1940).....8

Wiborg v. United States, 163 U.S. 632, 41 L. Ed. 289, 16 S. Ct. 1127 (1896).....8

STATUTES

18 U.S.C. 982(a)(2).....8

21 U.S.C. § 8533

OTHER AUTHORITIES

Orfield, *The Scope of Appeal in Criminal Cases*, 84 U. Pa. L. Rev. 825, 840 (1936)
.....6

RULES

Federal Rule of Criminal Procedure 52(b)6, 7

STATEMENT OF JURISDICTION

This court has jurisdiction over the appeal in this cause under 28 U.S.C. § 1291, which provides for an appeal from a final order of a district court. The appeal was timely filed within fourteen days of entry of judgment. An Amended Notice of Appeal was timely filed to expressly include the Order of Forfeiture and Restitution. [Doc. 247]. On July 3, 2018 this Court granted Congresswoman Brown permission to file this Supplemental Brief.

STATEMENT OF THE ISSUE

WHETHER THE COURT ERRED IN ORDERING CONGRESSWOMAN BROWN TO FORFEIT JOINTLY AND SEVERALLY WITH ELIAS SIMMONS AND CARLA WILEY UNDER 21 U.S.C. § 853?

STATEMENT OF THE CASE

Congresswoman Brown was charged by a 24-count indictment with conspiracy to commit mail and wire fraud in connection with her promotion of a charity called One Door Education as well as charges of tax evasion related to overstated charitable contributions and charges related to alleged false Congressional financial disclosure forms. [Doc. 1]. At trial, Congresswoman Brown was found guilty of all but four counts alleged in the indictment. [Doc. 133]. The Government moved, by amended motion, for entry of an order of forfeiture and restitution pursuant to 21 U.S.C. § 853 in Congresswoman Brown's case on November 21, 2017. [Doc. 233]. The district court issued an Order of Forfeiture and Restitution on December 6, 2017 granting the government's motion and ordering Congresswoman Brown to forfeit \$654,292.39 jointly and severally with Elias Simmons and Carla Wiley and an additional \$10,000.00 jointly and severally with Elias Simmons. [Doc. 247].

SUMMARY OF ARGUMENT

Honeycutt v. United States, 137 S. Ct. 1626 (2017) held that there is no statutory basis for joint and several liability under 21 U.S.C. § 853; therefore, the joint and several liability provisions of the forfeiture order in Congresswoman Brown's case are plain error. This plain error affects Congresswoman Brown's substantial rights and would seriously affect the fairness, integrity or public reputation of judicial proceedings if not corrected. *See Rosales-Mireles v. United States*, 2018 U.S. Lexis 3690 (U.S. Supreme Court June 18, 2018).

STANDARD OF REVIEW

When a defendant raises an issue on appeal that was not raised before the district court, the court of appeals may review only for plain error. Federal Rule of Criminal Procedure 52(b) provides that “[a] plain error that affects substantial rights may be considered even though it was not brought to the [district] court’s attention.” In *United States v. Olano*, 507 U.S. 725, 732 (1993), the Court established three conditions that must be met before a court may consider exercising its discretion to correct the error. “First, there must be an error that has not been intentionally relinquished or abandoned. Second, the error must be plain—that is to say, clear or obvious. Third, the error must have affected the defendant’s substantial rights.” *Molina-Martinez*, 578 U.S., at ___, 136 S. Ct. 1338, 194 L. Ed. 2d 444, at 452 (2016) (citations omitted). To satisfy this third condition, the defendant ordinarily must “show a reasonable probability that, but for the error, the outcome of the proceeding would have been different.” *Ibid.* (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 76, 82, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004)). Once those three conditions have been met, “the court of appeals should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Molina-Martinez*, 578 U.S., at ___, 136 S. Ct. 1338, 194 L. Ed. 2d 444, at 452 (internal quotation marks omitted). *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904-05 (2018).

ARGUMENT

WHETHER THE COURT ERRED IN ORDERING CONGRESSWOMAN BROWN TO FORFEIT JOINTLY AND SEVERALLY WITH ELIAS SIMMONS AND CARLA WILEY UNDER 21 U.S.C. § 853?

The United States Supreme Court decided *Honeycutt v. United States*, 137 S. Ct. 1626 (2017) on June 5, 2017. *Honeycutt* held that members of a conspiracy may not be held jointly and severally liable for property that a conspirator derived from the crime. *Honeycutt* at 1630. Furthermore, *Honeycutt* held that forfeiture pursuant to 21 U.S.C. § 853 “is limited to property the defendant himself actually acquired as the result of the crime.” *Honeycutt* at 1635. The district court in this case ordered, on December 6, 2017, that Congresswoman Brown forfeit \$654,292.39 jointly and severally with Elias Simmons and Carla Wiley and an additional \$10,000.00 jointly and severally with Elias Simmons. This order was clearly contrary to the holding in *Honeycutt*, but neither party brought the error to the district court’s attention. Since the error was not presented to the trial court it was forfeited; but at no point was the error waived by Congresswoman Brown. *See United States v. Olano*, 507 U.S. 725, 733-34 (1993):

Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938)

...

Mere forfeiture, as opposed to waiver, does not extinguish an "error"

under Rule 52(b). Although in theory it could be argued that "if the question was not presented to the trial court no error was committed by the trial court, hence there is nothing to review," Orfield, *The Scope of Appeal in Criminal Cases*, 84 U. Pa. L. Rev. 825, 840 (1936), this is not the theory that Rule 52(b) adopts. If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an "error" within the meaning of Rule 52(b) despite the absence of a timely objection.

United States v. Olano, 507 U.S. 725, 733-34 (1993). Here, because there was no waiver of the issue, the first condition of *Olano* is satisfied and the district court's forfeiture order is reviewable under the plain error standard of Federal Rule of Criminal Procedure 52(b).

This error also satisfies the second condition of *Olano*, that the error must be "plain," a term synonymous with "clear" or, equivalently, "obvious." *Olano* at 734. Here, the error appears on the face of the court record in the district court's Forfeiture Order [Doc. 247] and clearly violates the rule announced in the *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), which is now, and was at the time of the district court's order, binding Supreme Court precedent.

Finally, this error satisfies the third condition of *Olano* as it affected Congresswoman Brown's substantial rights, which "in most cases [] means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." *Olano* at 734.

The court of appeals should no doubt correct a plain forfeited error that causes the conviction or sentencing of an actually innocent defendant, see, e. g., *Wiborg v. United States*, 163 U.S. 632, 41 L. Ed. 289, 16 S.

Ct. 1127 (1896), but we have never held that a Rule 52(b) remedy is *only* warranted in cases of actual innocence.

Rather, the standard that should guide the exercise of remedial discretion under Rule 52(b) was articulated in *United States v. Atkinson*, 297 U.S. 157, 80 L. Ed. 555, 56 S. Ct. 391 (1936). The court of appeals should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.*, at 160. As we explained in *Young*, the "standard laid down in *United States v. Atkinson* [was] codified in Federal Rule of Criminal Procedure 52(b)," 470 U.S. at 7, and we repeatedly have quoted the *Atkinson* language in describing plain-error review, see *id.*, at 15; *Frady*, *supra*, at 163, n. 13; *Silber v. United States*, 370 U.S. 717, 718, 8 L. Ed. 2d 798, 82 S. Ct. 1287 (1962) (*per curiam*); *Johnson v. United States*, 318 U.S. 189, 200, 87 L. Ed. 704, 63 S. Ct. 549 (1943); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239, 84 L. Ed. 1129, 60 S. Ct. 811 (1940); see also *Connor v. Finch*, 431 U.S. 407, 421, n. 19, 52 L. Ed. 2d 465, 97 S. Ct. 1828 (1977) (civil appeal). An error may "seriously affect the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.

United States v. Olano, 507 U.S. 725, 736-37 (1993). Here, Congresswoman Brown was prejudiced by the district court's clearly erroneous forfeiture order and there can be no doubt that, had the district court followed the binding Supreme Court precedent in place at the time of the order, the forfeiture order would have been different. Furthermore, if this error is not corrected, it would seriously affect the fairness, integrity or public reputation of the judicial proceedings. See *Rosales-Mireles v. United States*, 2018 U.S. Lexis 3690 (U.S. Supreme Court June 18, 2018).

The Fourth Circuit in *United States v. Chittenden*, 2018 U.S. App. LEXIS 20681 (4th Cir. July 25, 2018), on remand from the U.S. Supreme Court, applied the

principals from *Honeycutt* to forfeiture under 18 U.S.C. 982(a)(2) and remanded the case to the district court for new determinations of the amount of forfeiture. This Court has remanded several cases for new forfeiture determinations because of the decision in *Honeycutt*. See *United States v. Elbeblawy*, 2018 U.S. App. LEXIS 21887 (11th Cir., August 7, 2018) (vacating the forfeiture order and remanding for reconsideration of the forfeiture in light of *Honeycutt*). Furthermore, in *United States v. Carlyle*, 712 F. App'x 862 (11th Cir. 2017), this Court held as follows:

While Defendant's appeal was pending in our Court, the Supreme Court decided *Honeycutt v. United States*, 137 S. Ct. 1626, 198 L. Ed. 2d 73 (2017). Addressing a forfeiture statute related to drug crimes, the Supreme Court rejected joint and several liability, holding that a coconspirator-defendant can be liable only for the property he acquired from the criminal activity. 137 S. Ct. at 1635. Given that decision and the Government's concession that the district court erred by holding Defendant jointly and severally liable for the entire amount of the wire-fraud proceeds, we vacate the forfeiture money judgment entered by the district court and remand for that court to reconsider its forfeiture ruling in light of *Honeycutt*.

Carlyle at 862-63.

CONCLUSION

For the reasons stated above, Congresswoman Brown respectfully requests this Honorable Court vacate the Order of Forfeiture and Restitution in her case and remand the case for determination of the forfeiture amount based on the amount of property personally obtained by Congresswoman Brown if the verdict and forfeiture judgment is not otherwise vacated under the merits arguments raised in this appeal.

Respectfully submitted,

KENT & McFARLAND
ATTORNEYS AT LAW

s/William Mallory Kent
William Mallory Kent
Florida Bar No. 0260738
24 North Market Street
Suite 300
Jacksonville, FL 32202
(904) 398-8000
(904) 348-3124 FAX
(904) 662-4419 Cell Phone
kent@williamkent.com
COUNSEL FOR BROWN

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS**

1. This document complies with the word limit of Fed. R. App. P 27(d)(2)(A) because this document contains 1,769 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) as the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Time Romans 14 point font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 16, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

s/William Mallory Kent
William Mallory Kent